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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 408

WESTERN NATURAL GAS COMPANY, *Petitioner*,

v.

CITIES SERVICE GAS COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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CITIES SERVICE GAS COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner, Western Natural Gas Company, prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Delaware entered in its Case No. 58, 1962.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 201 A.2d 164 and is printed as Appendix B hereto, *infra,* pp. 10a-22a. The opinion and judgment of the Superior Court of the State of Delaware In and For New Castle County are printed as Appendix C hereto, *infra,* pp. 22a-30a.

JURISDICTION

The opinion of the Supreme Court of Delaware was filed on May 21, 1964, and its judgment was entered on June 5, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The issues of exclusive jurisdiction and Petitioner's rights and immunities under the Natural Gas Act were raised in its Answer (A-10), its counterclaim (A-15), its cross motion for summary judgment (A-247, A-248), and its appeal to the Supreme Court of Delaware.[1]

STATUTES INVOLVED

This case involves §§ 4(c), 4(d), 5(a), 7(c), and 7(e) of the Natural Gas Act, 52 Stat. 822, 823, 825 (1938), 56 Stat. 84 (1942), 15 U.S.C. §§ 717c, 717d, 717f(c), and 717f(e); §§ 154.92-101, inclusive, and § 157.23(a) of the Regulations of the Federal Power Commission under the Natural Gas Act as issued by the Commission's Order No. 174-A on August 6, 1954, 18 C.F.R. 154.92-154.101, 157.23(a); and §§ 1.6(b) and 1.7(c) of the Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R. 1.6(b) and 1.7(c). All are set out in Appendix A, *infra*, pp. 1a-9a.

QUESTIONS PRESENTED

In this case, four specific steps were taken by the Federal Power Commission between 1954 and 1960 in the exercise of its jurisdiction under the Natural Gas Act:

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[1] Citations are to "Appellant's Appendix" used in the Supreme Court of Delaware, a certified copy of which is filed with this Petition.

(a) The Commission formally accepted for filing under Section 4 of the Act a rate schedule tendered by Western Natural Gas Company in 1954 specifying as its rate the price of 11 cents per Mcf then being paid to Western by Cities Service Gas Company;

(b) The Commission in 1955 issued to Western an unconditioned Certificate of Public Convenience and Necessity under Section 7 of the Act after giving public notice of hearing upon Western's application and specifying in the notice the 11 cents per Mcf rate;

(c) The Commission instituted in 1956 and subsequently dismissed in 1960 an investigation of Western's rates under Section 5(a) of the Act, using as a basis for its actions a Commission Staff comparison of Western's revenues and costs reflecting Western's 11 cents rate to Cities, and by its dismissal left the 11 cents rate in effect;

(d) The Commission docketed, and still has pending before it, a Complaint filed by Western when Cities ceased paying Western the 11 cents rate in 1958 because of Cities' claim that an 8 cents contract price always applied.

The questions presented are:

1. Whether the Commission, rather than a state court in a collateral action, has exclusive jurisdiction over determination of the effective rate level and the respective claims of the parties for overpayment and underpayment of the effective legal rate, and

2. Whether the acts of the Commission recited above did not establish the 11 cents rate as the only effective legal rate binding upon the parties in a subsequent collateral action brought by Cities in a state court to recover alleged overpayments.

STATEMENT

This case involves basic questions as to the interrelation of the Natural Gas Act, jurisdiction of the state courts, and collateral actions against natural-gas companies concerning their regulated rates. A summary of its history thus requires reference to actions by the Federal Power Commission as well as to proceedings in the state courts below:

1. Initial Actions by the Federal Power Commission

Pursuant to Commission orders issued following the June 7, 1954 decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, and under date of November 16, 1954, Petitioner, a producer of natural gas, tendered to the Commission (a) its rate schedule covering its sale to Respondent Cities Service Gas Company (Cities) from the Hugoton Field, Kansas, being made on June 7, 1954 (A-100), and (b) its application for Certificate of Public Convenience and Necessity authorizing continuation of that sale (A-31). The rate schedule as submitted for filing included a contract between Petitioner and Cities originally providing a price of 8 cents per thousand cubic feet (Mcf) (A-39), a supplement of even date which did not affect price (A-72), a "minimum price order" of the Kansas Corporation Commission effective since January 1, 1954, requiring producers to attribute a price of 11 cents per Mcf at the wellhead (A-78), and a copy of a billing statement showing that the price being collected on June 7, and at the time of filing, was 11 cents per Mcf (A-88).

On January 13, 1955, the Commission formally considered the tendered rate filing as identified on a table then before it expressly setting forth the 11 cents rate (A-196); voted to accept the rate for filing under Sec-

tion 4 of the Act; and made due entry of this action in its minutes (A-194). A formal notice of this Commission action under Section 4 was mailed to Petitioner on March 8, 1955 (A-90). A copy of the Commission's notice thereafter was mailed to Cities by Petitioner (A-134).

On August 10, 1955, the Commission caused to be published in the Federal Register a notice of hearing on Petitioner's application for Certificate of Public Convenience and Necessity under Section 7 of the Act, announcing hearing thereon on September 7, 1955, and expressly stating: "The price for the gas is stated to be 11¢ per Mcf." The Notice also advised that protests or petitions to intervene might be filed on or before August 25, 1955.[2] None was filed by Cities or any other person.

On September 14, 1955, the Commission issued to Petitioner an unconditioned Certificate of Public Convenience and Necessity under Section 7 of the Act to continue its sale as described in Petitioner's application (A-31).

Cities filed no protest with the Commission as to these actions and sought no appeal therefrom under Section 19(b) of the Natural Gas Act, although Cities had notice of Petitioner's filings through the Federal Register and because copies of the tendered rate schedule and application for certificate were served upon Cities by Petitioner at the time of filing with the Commission (A-191-192). Cities also continued to pay Petitioner at the 11 cents rate after these Commission actions.

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[2] The Commision's Notice is reproduced as Appendix D, *infra*, pp. 31a-32a.

2. The Section 5(a) Investigation

On January 26, 1956, the Commission instituted a formal investigation, under Section 5(a) of the Natural Gas Act, of all of Petitioner's rates subject to Commission jurisdiction, including the rate for Petitioner's sale to Cities (A-106). Public notice of this proceeding was issued, and some 60 communities and other interested parties intervened, but Cities did not do so.

After lengthy formal hearings and an Examiner's decision, the record went before the Commission. Upon this record, the Commission on January 20, 1960, entered its order terminating the Section 5(a) investigation, leaving Petitioner's rates in effect.[3] The Commission's termination rested upon its conclusion that Petitioner's total revenues were not "unreasonable" or "excessive" when compared to its total jurisdictional cost of service. In turn, this conclusion rested upon the record, including a Commission Staff Exhibit entitled "Interstate Rate Schedules Effective During Test Year" (1956), which utilized, for the Kansas sale here involved, the rate of 11 cents (11.0011 cents) per Mcf.[4]

While the Commission stated that its action was not to be construed as a "determination" as to what Petitioner's "effective legal rates are or have been,"

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[3] The Commission's order is reported as *Western Natural Gas Co., Docket No. G-9281*, 23 FPC 235 (1960). The Examiner's Decision is reported at 23 FPC 238 (1959).

[4] The Staff Exhibit was reproduced below as a part of the Appendix to the "Reply Brief of Defendant-Appellant" in the Supreme Court of Delaware. A certified copy has been filed with this Court.

the result of the Commission's action was to leave unchanged the rates then in effect under Section 4 of the Act.

3. The Complaint Before the Commission

Following the rate schedule filing and issuance of Petitioner's Certificate of Public Convenience and Necessity, payments were made by Cities at the 11 cents rate until the date for the first settlement following the January 20, 1958, decision of this Court declaring the Kansas minimum price order invalid.[5] Neither Petitioner nor the Commission was a party to the suit which ultimately resulted in that decision, and the decision did not involve the status of the rates on file under the Natural Gas Act for sales in Kansas. However, on January 29, 1958, Cities notified Petitioner that because of that decision, it was resuming payments at 8 cents per Mcf (A-150). Neither then, nor thereafter, did Cities seek any action by the Commission that would result in placing this 8 cents price in effect as a rate, or changing the effective 11 cents rate recognized by Commission acceptance for filing of Petitioner's rate schedule and issuance to Petitioner of a Certificate of Public Convenience and Necessity.

On April 23, 1958, because of Cities' unilateral decision to discontinue payments of the 11 cents rate, Petitioner filed a Complaint with the Commission under Sections 1.6(b) and 1.7(c) of its Rules of Practice and Procedure, alleging that Cities' action was a violation of the Natural Gas Act and seeking appropriate action by the Commission, including a de-

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[5] *Cities Service Gas Co.* v. *State Corporation Comm'n.*, 355 U.S. 391 (1958).

termination of the obvious dispute over the effective rate Cities was legally obligated to pay (A-124).

The Commission docketed the Complaint and cited Cities to appear and answer, and Cities did so appear and answer on June 19, 1958 (A-149). The Commission thereafter did not proceed to decide or otherwise dispose of the Complaint, but retained it, and continues to retain it on its docket without decision to date.

4. The State Court Suit

On June 16, 1958, while the Complaint and Section 5(a) proceedings were pending before the Commission, Cities filed suit against Petitioner in a Superior Court of the State of Delaware seeking recovery of payments made in excess of an 8 cents price from January 1, 1954, through December 22, 1957 (A-4). The claimed right of recovery rested on contract, restitution, or unjust enrichment, the complaint asserting merely the claimed contract price, the excess payments allegedly made pursuant to the state order only, the invalidity of that order, and a right of recovery on the basis of payments involuntarily made and/or that a "contract" for refund existed. The complaint carefully stated no cause of action or other assertion of right under the Natural Gas Act.

Petitioner answered (A-10) attacking the jurisdiction of the state court, urging that prior and exclusive jurisdiction over the controversy lay in the Commission not only because of various Commission actions, including the prior and then pending Complaint and Section 5(a) proceedings, but also because of the operation of the Natural Gas Act. Petitioner also urged in bar to the asserted claim of overpayment

that the filings with, and actions by, the Commission operated to establish the legal, effective rate of 11 cents per Mcf under the Natural Gas Act, and that such rate remained effective and binding on the parties until changed by Commission action under Sections 4 or 5(a) of that Act. In addition, Petitioner filed a counterclaim seeking recovery of the amounts due for gas delivered subsequent to December 22, 1957, at the 11 cents effective rate which Cities had ceased paying (A-15).

Both Petitioner and Cities filed motions for summary judgment. On May 24, 1960, the trial court filed its Memorandum of Decision (A-247) granting Cities' motion for summary judgment and denying Petitioner's motion.

Each of the federal questions raised by Petitioner was briefed and argued before the trial court (A-244, A-324), which held that the effective rate remained the "contract rate," that the state court had jurisdiction to hear and decide the case, and that under the facts, Cities was entitled to restitution of amounts paid in excess of an 8 cents contract price. After further proceedings not involving the federal questions, the trial court entered its final judgment on June 25, 1962 (A-344).

5. The Delaware Supreme Court Decision

Petitioner appealed to the Supreme Court of the State of Delaware, where each of the federal questions involving the Natural Gas Act was presented, briefed, and argued in the original briefs and more fully upon a Motion for Reargument following a decision of that court rendered on March 28, 1963, but later set aside.

On May 21, 1964, the Supreme Court of Delaware, after hearing reargument following its first decision, filed its opinion holding (a) that the state court had jurisdiction to hear and decide the case; (b) that the prior pending Complaint proceeding before the Commission was not a bar to hearing, decision, and judgment upon the controversy in the state court; (c) that despite the Commission's actions under Sections 4, 5(a) and 7 of the Natural Gas Act, the contract price remained the "effective rate" so that Cities had made overpayments; and (d) that genuine issues of fact existed only with respect to Cities' right to recover on the theory of restitution. So holding, the court set aside the trial court's judgment granting Cities' motion for summary judgment, and remanded the case for further proceedings in accordance with such opinion.

Thus, despite the Commission's orders accepting the 11 cents rate for filing, granting a Certificate authorizing sale at the 11 cents rate, and recognizing the 11 cents rate in the Section 5(a) proceeding, the Delaware Supreme Court has held in a collateral action that the "effective rate" was 8 cents per Mcf, and that a state court may award recovery for "overpayments." It has so held even though there has been no action by the Commission to set aside or modify these prior orders, no decision in the prior pending Complaint proceeding before the Commission raising the same issues, and no filing under the Act to place an 8 cents rate in effect.

The May 21, 1964, decision of the Delaware Supreme Court is final and conclusive as to all federal questions presented: (a) whether a state court has jurisdiction to hear and determine the question of the

effective rate under the circumstances outlined above, (b) whether a contract price or the 11 cents rate effective under the Natural Gas Act is the rate binding upon the parties, and (c) whether the prior pending Complaint proceeding before the Commission involving the same issues constitutes a bar to resolution or judgment by the state court. The decision of the Delaware Supreme Court also is final as to Petitioner's rights under its counterclaim, since such rights depend exclusively upon Petitioner's claim of the binding effect of the effective rate of 11 cents due to operation of the Act and Commission actions thereunder.[6]

Thus, the decision of the Delaware Supreme Court on the federal question is final within the doctrine of *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555 (1963) and *Local No. 438* v. *Curry,* 371 U.S. 542 (1963). As stated in the latter decision (371 U.S. at 549):

> "The judgment before us . . . falls in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

See also *City of Seattle* v. *Beezer,* 376 U.S. 224 (1964). As to the federal questions involved, Petitioner therefore now seeks review by this Court.

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[6] The counterclaim as filed asserted a portion of the sale to be outside the jurisdiction of the Commission, but this position was later abandoned, and Petitioner's claimed right of recovery is now based exclusively on the position that the 11 cents rate became, was, and is the only effective rate due to operation of the Natural Gas Act. See *Pope* v. *Atlantic Coast Line Ry. Co.,* 345 U.S. 379 (1953).

REASONS FOR GRANTING THE WRIT

The decision below conflicts in principle with this Court's construction of other federal statutes,[7] but the basic questions here involving the Natural Gas Act have not previously been passed upon by this Court. The state court has erroneously decided these federal questions in favor of state court jurisdiction.

1. The Decision Permits State Court Control of Rates Within the Federal Power Commission's Exclusive Jurisdiction

Regulated companies cannot follow dictates of two separate authorities as to past, present, or future rates; they cannot operate under a system in which one set of directives is applicable under a federal rate regulatory statute, but courts are left free to announce and impose conflicting obligations. One forum must yield to the other, and under the erroneous holdings below, it is the state courts which are free to proceed as though Commission action under the Natural Gas Act is of no legal effect.

Regardless of jurisdiction of a state court to entertain a complaint which does not assert a theory of recovery predicated on rights flowing from the Act, when that court proceeds to adjudicate an "effective" rate and enforce its conclusion, that court is assuming jurisdiction over the rate for all periods involved in the controversy before it. When the court does so by treating prior Commission action as of no legal effect and disregards the Commission's jurisdiction, that court also is exercising the rate control which is exclusively the Commission's.

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[7] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) (Federal Power Act); *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (Interstate Commerce Act).

This case brings before this Court the substantive issues on the merits of the "filed rate" question left unresolved in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware,* 366 U.S. 656 (1961), wherein this Court stated that it was "not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private rights in controversy."

Established principles under the Act have been that effective rates may not be changed retroactively (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944)), and, under lower federal court decisions, that the "filed rate" doctrine is applicable, *i.e.,* the specific rate filed with the Commission becomes and remains the *only* legal, binding rate until changed under Section 4 or 5.[8]

Adherence to these principles provides stability and certainty in rates not possible under the doctrine of the lower court's decision. For, under that decision, state or federal courts, on determination that a contract price is different from the rate on file with the Commission, may enforce that contract price without any prior filing with or action by the Commission to

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[8] See *McClellan* v. *Montana-Dakota Utilities Co.,* 204 F. 2d 166 (8th Cir. 1953); *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F. 2d 860 (10th Cir. 1960); and *Signal Oil & Gas Co.* v. *Federal Power Commission,* 238 F. 2d 771, 773 (3rd Cir. 1956), applying the principle set out in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951). An apparent conflict as to applicability of the "filed rate" principle under the Natural Gas Act is reflected by *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.,* 297 F. 2d 561 (8th Cir.), *cert. den.* 370 U.S. 937 (1962), relied upon below.

"correct" or change the rate so filed and without any filing with the Commission to cause the contract rate to become the effective rate under the Act.

Antecedent contracts underlie most rates filed with the Commission, and disputes over the price to be derived from one contract clause or another, at any particular time, are legion. If in disregard of Commission procedures, courts may decide such disputes and enforce the contract price provisions as construed by them, the rates become not what the Commission permits to become effective but what the first court to act decides.

The decision below had its genesis in a filed rate involving a state order, but the issues reach all rates filed with the Commission. The implications of such decision on the unresolved issues are not merely matters of esoteric theory. The practical effects are far-reaching and destructive of Commission supervision of rates under the Act. If, for example, Cities can prevail in a state court in this case, there is no reason why any buyer claiming to be aggrieved by allegedly illegal rates cannot do the same. If this is true, there also is no reason why the seller cannot, in turn, seek judgment in a state or federal court of its own choosing before or after the filing of such a suit by the buyer. Moreover, while the Delaware court has sanctioned a lesser rate in this case, another court may well sanction higher rates in future cases despite any disposition the Commission may have to the contrary. These are not hypotheses, but practical forecasts of what logically follows from the decision below. If it is allowed to stand, there may well be three jurisdictions adjudicating rights relative to each and every disputed rate—the state court chosen by the

buyer, the court chosen by the seller, and presumably the Commission. This Court should not countenance, in this vital field, a continuation of such a procedural system generating confusion not only as to which forum has jurisdiction, but also as to which has acted with finality to establish the binding, effective rate.

2. The Decision Conflicts With Lower Federal Court Decisions Construing Section 4 of the Act

The holding below conflicts with *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F.2d 860 (10th Cir. 1958), a review proceeding under Section 19(b) of the Act involving effect of Commission acceptance of a Kansas 11 cents rate for filing over protest. There, it was held that Commission action accepting that rate for filing under Section 4 was a final order which, unless set aside by timely review, would establish the 11 cents rate as the binding, effective rate regardless of the purchaser's allegations that such rate was "unilateral" and not in accord with the purchaser's contract.[9]

Here, no filing has been made with the Commission to place in effect the contract price now claimed by the purchaser, and the Commission's prior actions as to the rate remain effective, unreversed, and unmodified. Unlike the Tenth Circuit, however, the court below does not treat Commission orders under Section 4 as final, but would permit a party "aggrieved" by Commission action to avoid their binding effect by collateral action later in a state court.

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[9] Section 19(a) of the Natural Gas Act provides, in pertinent part:

> "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for rehearing thereon."

Heretofore, it has been held that a specific contract price may not be collected until made effective under Section 4, and then may be collected only prospectively from the date of effectiveness, *Cities Service Gas Producing Co.* v. *Federal Power Commission,* 233 F. 2d 726 (10th Cir.), *cert. den.* 352 U.S. 911 (1956); that despite existence of a contract provision calling for automatic escalation downward in price, a court cannot award recovery for payments made under a previously effective higher rate which has not been changed by filings with the Commission and remains effective, *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F.2d 388 (5th Cir. 1947); and that sellers have no right to collect a higher price set out in contractual provisions providing for price increases until such time as the higher contractual price actually has been filed and made effective by the Commission under Section 4, *Deep South Oil Co.* v. *Federal Power Commission,* 247 F.2d 882 (5th Cir. 1957), *cert. den. sub nom. Humble Oil & Refining Co.* v. *Federal Power Commission,* 355 U.S. 930 (1958); *Bel Oil Corp.* v. *Federal Power Commission,* 255 F.2d 548 (5th Cir.) *cert. den.* 358 U.S. 804 (1958).

The decision below obviously conflicts with these earlier decisions as to the relationship of Section 4 to contract rights, and thus interjects confusion for both those who sell and those who buy at rates in effect under Section 4.

3. The Decision Permits State Courts to Treat Commission Actions Under Section 4, 5(a) and 7 As Nullities

This case also involves the legal effect of Commission acts under Sections 7 and 5(a) of the Act.

On the question of effect of the Commission's grant of an unconditioned Certificate under Section 7 au-

thorizing continuation of a sale at the rate tendered by the seller, there has been no decision by any other court to our knowledge. However, in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), this Court made clear that the Commission must and does consider rate in granting a Certificate and has power to condition such a Certificate upon the filing of a rate other than a proposed contract rate; and the Commission does, in fact, impose "conditions" requiring the filing of "non-contract" rates (see *Cities Service Gas Co.*, 14 FPC 134 (1955); *Skelly Oil Co.*, 28 FPC 401 (1962)).[10] Here, the Commission gave public notice of the tendered rate, and no objection was made prior to hearing or after issuance of an unconditioned Certificate.[11] The Commission thereby fixed the terms and conditions upon which Petitioner was authorized to make its sale, but the court below, in effect, changes Petitioner's Section 7 Certificate, even though there has been no modification by the Commission. Petitioner does not contend that Section 7 authorization alone establishes a rate, but it is obvious that the holding below is based upon the erroneous assumption that state courts are empowered to impose conditions for a jurisdictional sale which differ from the Commission's authorization under Section 7.

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[10] See also *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (9th Cir. 1960); *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (5th Cir. 1961); *Public Service Commission of New York* v. *Federal Power Commission*, 329 F.2d 242 (D.C. Cir. 1964).

[11] Such an order was final and appealable. See *Atlantic Refining Co.* v. *Public Service Commission of New York, supra; Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957).

Commission actions under Section 5(a) also illustrate the need for resolution of the question of whether the specific rate filed under Section 4, irrespective of consistency with an antecedent contract, is binding in collateral court actions. Here, as in every Section 5(a) rate case, the Commission was required to compare effective rates, jurisdictional revenue received thereunder, and the company's costs; and for this purpose, the Commission used for the sale here in question the rate of 11 cents effective under Section 4. After so testing Petitioner's jurisdictional revenues, the Commission terminated its investigation, the effect being to leave the then effective 11 cents rate unchanged under the Act.

The Section 5(a) proceeding thus illustrates that assumption of jurisdiction over rates by a state court can only undermine the most fundamental purposes of rate regulation under the Act: (1) continuous, exclusive supervision of rates by the regulatory agency, and (2) certainty as to what the rates are at any and all points in time by reference to the acts, orders, and decisions of the regulatory agency only. Where a company's revenues have been so tested under the Act's standards, its rights, and those of others affected, are nullified if it is deprived of its revenues by subsequent state court enforcement of "rates" different from the effective rates used for testing before the Commission.

4. The Decision Conflicts With the Principles of Primary Agency Jurisdiction and Exhaustion of Administrative Remedies

The holding below also treats Commission Complaint procedures as irrelevant, and the court thereby erroneously disregards applicability of the doctrines

of primary agency jurisdiction and requirement for exhaustion of administrative remedies. Throughout the action in the state courts, Petitioner's complaint raising the same issues has been pending before the Commission. The Delaware court, however, misconstrues Commission inaction thereon as a "disclaimer" of jurisdiction, and apparently assumes that even if it so desired, the Commission lawfully could "delegate" its primary jurisdiction over the rates and the controversy to state courts.

That there has been no "disclaimer" is reflected by the Commission order issued February 7, 1962, terminating its Docket No. R-168 "rule-making" proceeding which was originally instituted to resolve disputes over the Kansas 11 cents rates (27 FPC 326). There, the Commission said:

> "We believe at this late date a rule-making proceeding would be a cumbersome and inappropriate means by which to *exercise our jurisdiction* over the matters involved herein. *Such matters can more conveniently be decided when properly raised in individual proceedings before us* * * *." (27 FPC 327, emphasis added)

Far from a "disclaimer," this statement is an unequivocal assertion of jurisdiction, and a reference to "individual" proceedings before the Commission, such as Petitioner's Complaint proceeding, as a proper proceeding for decision of the controversy over the effective rate. The Commission's role in such Complaint proceedings is illustrated by Commission action as recently as March 9, 1964. After the filing of a complaint by a seller under the same procedures invoked by Petitioner, the Commission exercised its jurisdiction, decided a controversy over the effective rate and

the purchaser's payment obligations, and ordered the purchaser to resume payments at the seller's rate on file and effective under Section 4. (*Superior Oil Co.* v. *Trunkline Gas Co.*, ... FPC ..... (FPC Docket No. RI64-273, "Declaratory Order Requiring Payment of Legally Effective Rate").

To our knowledge, no case has dealt specifically with the question of jurisdiction of a court to proceed with collateral determination of rate questions already pending before the Commission in such a Complaint proceeding. However, it has been held that an injunction should not issue to prevent a seller from proceeding with a rate increase application pending before the Commission (*Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F.2d 73 (5th Cir. 1954)), and that the courts are without jurisdiction in collateral proceedings to construe and enforce a contract on file with the Commission and there the subject of proceedings on the same or similar issues (*Superior Oil Co.* v. *El Paso Natural Gas Co.*, 377 S.W.2d 691 (Tex. Ct. Civ. App. 1964); see also *Van Lewis* v. *Transcontinental Gas Pipe Line Corp.*, 200 F.Supp. 219 (S.D. Tex. 1961)). By analogy here, the Complaint proceeding cannot be disregarded and bars state court decision in a subsequently filed action involving the same issues.

The course followed by Cities here should be compared with the course followed by it in *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir. 1958). There, Cities proceeded with the required steps of protest and application for rehearing before the Commission, and timely petition for review under Section 19(b) of the Act. Here, the same procedures were available and required, and may have resulted in a timely Commission "condition" as to effectiveness of the disputed rate pending resolution of any

issues as to validity of a state order.[12] Beyond this, having notice of the Commission's hearing on the Certificate under Section 7, Cities could have intervened, presented its protests, and urged "conditioning" of Petitioner's Certificate as to rate. See *Pan American Petroleum Corp.*, 24 FPC 1051, 1053 (1960). Cities, however, chose not to avail itself of required administrative and statutory remedies, but "elected" to await the outcome of collateral litigation involving the pricing order, and then seek reparations contrary to the Act's design as construed in *Hope*, and determination as to rate inconsistent with the Commission actions under Sections 4, 5(a) and 7.

This case thus is a history of a course by a private party which the doctrines of primary jurisdiction and exhaustion of administrative remedies were evolved to prevent. See *Far East Conference* v. *United States*, 342 U.S. 570 (1952); *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59 (1956). Under the constructions below, these established doctrines are considered inapplicable. Instead, procedures for adjudicating rate disputes and thereby establishing "effective" rates are to be the range of available actions in state or federal courts such as for declaratory judgment, common law contract interpretation, and recoveries on contract or in equity in state or federal courts. If the Delaware court is correct, the selected forum will be that which, in the plaintiff's view, is most likely to look favorably upon its contentions, but, in the court action, the pendency of a proceeding upon the same contro-

[12] Such a procedure was followed by the Commission after purchasers' protests, in its acceptance for filing of rate increases by Louisiana producers based upon a Louisiana severance tax statute being tested in the courts and subsequently held invalid. See *Tennessee Gas Transmission Co.* v. *Federal Power Commission*, 322 F. 2d 1006 (D.C. Cir. 1963).

versy before the Commission will have no bearing upon the chosen court's proceeding to judgment; and prior Commission acts controlling effective rate level will be deemed irrelevant to final judgment and enforcement of a contract price as determined by the court.

If such a court then proceeds as here, a rate previously definite and certain by Commission action under Section 4, recognized by issuance of a Certificate under Section 7, and utilized in testing revenues in a Section 5(a) rate case, can be effectively nullified outside of the Act's procedures and recovery of "reparations" had contrary to its design.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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August 27, 1964

APPENDIX A

1. The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et seq.*, provides in pertinent part:

> Section 4(c). Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> Section 4(d). Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [52 Stat. 822 (1938), 15 U.S.C. § 717c]
>
> Section 5(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint

of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938), 15 U.S.C. § 717d]

* * * * * * * * *

Section 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the

Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c)]

• • • • • • • • •

Section 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the

acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

• • • • • • • • • •

2. The Rules of Practice and Procedure of the Federal Power Commission under the Natural Gas Act, 18 C.F.R., provide in pertinent part:

§ *1.6 Complaints and orders to show cause.*

• • • • • • • • • •

(b) *Formal complaints*—(1) *Form.* Formal complaints shall be in writing and under oath and shall conform to the requirements of §§ 1.15 and 1.16. In such complaints there shall be stated the names and addresses of all parties, complainant and defendant, in full without abbreviations, with the name and address of each complainant's attorney, if any.

(2) *Substance.* Formal complaints shall be so drawn as fully and completely to advise the parties, defendant and the Commission of the facts constituting the grounds of the complaint, the provisions of statutes, rules, regulations, and orders relied upon, involving authority of the Commission, the injury complained of, and the relief sought.

• • • • • • • • • •

§ 1.7 *Petitions.*

* * * * * * * * *

(c) *For Declaratory Orders.* Petitions for the issuance, in the discretion of the Commission, of a declaratory order to terminate a controversy or remove uncertainty, shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of petitioner's interest, and shall conform to the requirements of §§ 1.15 and 1.16.

* * * * * * * * *

3. The Regulations of the Federal Power Commission under the Natural Gas Act, 18 C.F.R., in effect under Order 174-A issued August 6, 1954, provided in pertinent part:

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for recent month in sufficient detail to show how the billing amount is determined.

* * * * * * * * *

§ 154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and appli-

cable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification, or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements*—If any rate schedule or change in a rate schedule is not in writing, its terms

shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 *Cancellation or Termination*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information re-

quired by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101. *Acceptance for Filing not Approval*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

* * * * * * * * *

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer* — (a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

APPENDIX B

(Opinion and Judgment of the Supreme Court of Delaware)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 58, 1962

WESTERN NATURAL GAS COMPANY, Appellant,

vs.

CITIES SERVICE GAS COMPANY, Appellee.

(May 21, 1964)

Terry, Chief Justice, and Wolcott and Carey, JJ., sitting.

Appeal from summary judgment for plaintiff entered in the Superior Court of New Castle County.

Clair J. Killoran and Courtney H. Cummings, Jr., of Killoran and Van Brunt, of Wilmington, and Hogan & Hartson, of Washington, D. C., and John C. Dawson, of Liddell, Austin, Dawson & Sapp, of Houston, Texas, and J. Colin Lizotte, of Enright & Lizotte, of Milford, New Hampshire, for appellant.

Howard L. Williams and Henry N. Herndon, Jr., of Morris, James, Hitchens and Williams, of Wilmington, and C. C. Mount and Charles V. Wheeler, of Oklahoma City, for appellee.

Carey, J. (for a majority of the court):

The defendant below has appealed from an order of the Superior Court granting summary judgment to the appellee. Cities Service Gas Company (Cities) operates an interstate pipe line company and Western Natural Gas Company (Western) is a producer of natural gas. The action was brought to recover alleged overpayments for natural gas purchased by Cities from Western from January 1, 1954 to January 1958. The matter is now before this Court on motions of both parties for reargument. This Court previously filed majority and dissenting opin-

ions, but the petitions for reargument were granted. Following this, the former Chief Justice left the bench and the reargument therefore covered all phases of the case. Because we have concluded to withdraw the prior opinions, it is necessary to discuss the matter in full.

Two earlier cases involving these overpayment actions have been passed upon by this Court. See Columbian Fuel Corporation and Pan-American Petroleum Corporation v. Superior Court, 52 Del. 365, 158 A. 2d 478; aff'd 366 U. S. 656, 81 S. Ct. 1303; Helmerich & Payne v. Colorado Interstate Gas Company, —— Del. ——, 187 A. 2d 67.

The background of this case and many of the pertinent facts giving rise to the action are to a great extent the same as in the first cited case, which involved a similar suit for overpayments brought by Cities in the Superior Court. For a discussion of the Kansas minimum price order effective January 1, 1954, Cities' letters of protest to its suppliers of gas and payments for gas at the rate fixed by the order, Cities attack on the Kansas order, and the final voiding of the order on January 20, 1958 by the Supreme Court of the United States, see the opinion in the Columbian case, supra. Cities' protest letter to Western appears to be identical with that sent to Columbian and Pan-American. We see no reason to repeat these matters in this opinion.

In this case, as in the former cases, the producer, after the Federal Power Commission had assumed jurisdiction in June 1954, filed a copy of the contract and the Kansas price order with the Commission to establish the rate for gas between the parties. A copy of the protest letter was not filed.

The present case raises issues not directly involved in the Columbian case, which presented primarily the question of the jurisdiction of a state court to entertain the suits for refunds. That jurisdiction was upheld, but the merits,

i.e., the right to recover, were not involved. See 81 S. C. 1303.

In granting summary judgment to Cities, the trial Judge held:

1. The pleadings state a good cause of action for restitution, and the undisputed facts support the pleadings.

2. Plaintiff has no administrative remedy.

3. Plaintiff is entitled to interest from the date the Kansas order was declared invalid.

4. The statute of limitations does not bar the action.

All of these holdings are challenged by Western.

The contract between the parties set a price of 8¢ per M. C. F. but it contained the following clause:

"This agreement is subject to all present and future laws and valid orders, rules and regulations of any regulatory body having jurisdiction."

The contract price could, therefore, be changed by mutual agreement, or by promulgation of a valid regulation by a governmental authority having jurisdiction to do so. Had the Kansas regulation been valid, the result would have been an automatic increase in the contract rate to 11¢. Being invalid and void ab initio, the regulation itself in fact made no change in that contract price. Prior to June 1954, when the Federal Power Commission first asserted jurisdiction, there is no basis for saying that Cities was contractually bound to pay 11¢.

Western contends, however, that the legally effective rate became 11¢ commencing in June 1954 when the Federal Power Commission first asserted jurisdiction, wherefore Western argues that a state court has no power to change it retroactively by ordering repayments.

This argument was dealt with in the Columbian case, supra, wherein this Court cited several Federal decisions. To them may be added Pan-American Petroleum Corporation v. Kansas-Nebraska Natural Gas Company, Inc., 297 F. 2d 561. It was held that the Natural Gas Act is not inconsistent with reimbursement for overpayments, because the Kansas order was void ab initio and the contract rate controlled.

Western makes another contention which concerns not only the matter of the effective rate, but also the power of a state court to decide the matter. This argument is based on two proceedings before the Federal Power Commission.

The first proceeding was originated by a complaint filed on August 31, 1955 by Tennessee Public Service Commission and others with respect to rates charged by Western. Thereupon, the Commission instituted an investigation into all the rates charged or collected by Western. It held a number of hearings. Cities did not seek to intervene. On December 31, 1959, the presiding examiner made a finding that Western's rates had not been shown to be unjust. He also stated that dismissal of the complaint would have the effect of determinating that the existing rates would be continued. As the 11¢ rate was one of those under consideration, Western now contends that the Commission in fact adjudicated the rate. The answer to this suggestion is that the Commission itself modified the Examiner's findings. Its final order expressly held that it was making no determination as to whether Western's individual rates were just and reasonable, that its dismissal of the complaint was not a determination that the existing rates should be continued, that it did not adopt the examiner's finding to the effect that none of those rates had been shown to be unjust or unreasonable. Moreover, it expressly directed that its order was not to be construed as a determination of what the effective legal rates are or have been for jurisdictional sales by Western.

In another proceeding before the Commission, Western complained against Cities for failure to pay the 11¢ rate, Cities having ceased to pay it after Kansas regulation was declared void. Later Western requested that this proceeding be consolidated with another matter pending before the Commission. The Commission denied the application to consolidate, holding inter alia, as follows:

> "Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission at this time to undertake to determine the rates for those sales . . . ."

This language appears to amount to a disclaimer of jurisdiction over the dispute now before us.

In a separate proceeding, the Commission had before it a proposal to amend its rules so as to provide for the rejection of any tender for filing to the extent that the filing was based on a State-prescribed minimum price. This proceeding was initiated on April 28, 1958 and early in 1962 the Commission decided to terminate that proceeding, stating that "at this late date a rule making proceeding would be a cumbersome and inappropriate means by which to exercise our jurisdiction over the matters involved here . . . . We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a State minimum price law can invoke the jurisdiction of an appropriate Court in the event that his contract provides for a refund if the State minimum price laws are held invalid".

The foregoing language seems to emphasize that the Commission has disclaimed jurisdiction over the subject matter of refund litigation growing out of rate filings based on State minimum price orders, or, at least has recognized the existence of such jurisdiction in State Courts.

We are accordingly of the opinion that nothing done by the Commission has altered the contract rate or fixed a minimum price of 11¢ for the period within which we are concerned. We also continue to be of the opinion that our Superior Court has jurisdiction to determine this matter.

The net result is that neither the invalid Kansas regulation nor any action of the Federal Power Commission made any change in the price of 8¢ which was accordingly the *effective* rate throughout the pertinent period. It follows that, had Cities paid only 8¢, Western would have no valid ground to sue for the excess. Of course, Cities did pay 11¢ up to the time of the Supreme Court decision, and the question is whether it may now recover the excess.

The complaint, as amended, contains three theories: (1) Cities protest letter of January 21st, 1954, followed by the notations on the monthly checks specifically referring to that letter and the acceptance of those checks by Western, constituted an agreement on the part of Western to refund the excess if and when the regulation was declared invalid; (2) the excess was paid by Cities because of business compulsion or duress and Cities is therefore entitled to restitution; (3) the excess was paid involuntarily and Western was unjustly enriched thereby, wherefore Cities is entitled to restitution. The Court below held that a case for restitution was shown by the uncontradicted evidence in the record, and it declined to rule on the "contract" theory. Because that contention was not decided by the trial court and was not raised before us until the petition for rearguments, we prefer not to decide it at this stage. The question we must pass upon is whether the undisputed evidence—consisting of affidavits, answers to request for admissions and certain allegations in the complaint admitted by the answer—justifies entry of summary judgment for Cities.

The ruling of the Court below is challenged by Western on several grounds: (1) the record does not justify a find-

ing of business compulsion and there should at least be a trial before its existence can be determined; (2) payment of the excess was a voluntary one which can not be recovered, or, at least. it cannot be held involuntary without further proof; (3) the excess was paid by mistake of law for which no recovery may be had; (4) there has been no unjust enrichment because Cities was reimbursed by an increase in the rates paid by its customers and has therefore lost nothing; (5) the action is barred by the statute of limitations.

Although in the arguments before us much stress has been laid upon the theory of business compulsion or duress, that theory of recovery is not even mentioned in any of the opinions of the lower Court. At one point, in discussing the propriety of summary judgment, that Court refers to its prior holding in Cities Service Gas Co. v. Columbian Fuel Corp., 2 Storey 262, 155 A. 2d 879, as being dispositive of many of the arguments made in this case. As we read the Columbian opinion, aside from the matter of jurisdiction, it deals primarily with a determination of the true "filed" or effective rate, counsel having conceded that Columbian could not retain any money paid in excess thereof. No determination was made as to the existence of duress. In the present case, we have no such concession.

At another point in the opinion below, however, in dealing with the statute of limitations, the Court cites and relies upon decisions which allowed recovery of money paid under a judgment or decree which is subsequently reversed. See Restatement, Restitution Sec. 74. It points out the analogy between payments made by reason of such a reversed judgment and those made under a statute or substantive administrative regulation held to be void.

We are, accordingly, not certain as to just what was the true basis of the Court's finding, although clearly it was not predicated upon a contract to repay.

Of course, payment voluntarily made with full knowledge of the facts cannot be recovered, in the absence of a contract to repay. 40 Am. Jur. 822. A payment under protest is not necessarily involuntary, nor is it made so by unilaterally calling it involuntary at the time of payment; Natural Gas Pipeline Co. v. Harrington, 246 F. 2d 915; Monaghan v. Lewis, 5 Penn. 225, 59 A. 948; 40 Am. Jur. 820; but where money is paid because of duress, the payment is involuntary. The question is basically one of fact, although undisputed facts may justify summary judgment.

The plaintiff here maintains that the undisputed facts in the record require the finding of involuntariness by reason of duress. It contends that it was forced to pay the higher charge by the Kansas statute which carried criminal sanctions. These are cases holding that payments required to be made by an administrative order are similar in effect to those made pursuant to a judgment, the order constituting sufficient compulsion to render the payment involuntary. Restitution has been ordered in such cases when the administrative order was declared invalid. 2 Am. Jur. 2d. 676. In every instance we have seen of this type, however, the order was clearly applicable to both payor and payee. Here, the Kansas Supreme Court held, in Cities Service Gas Co. v. State Corporation Commission, 304 P. 2d. 528, that the order (therefore, presumably, the criminal sanctions) applied only to the seller. It is not suggested that Cities was motivated by the desire to protect Western against those sanctions. In other words, the order did not require Cities to pay, although it required Western to collect. Cities was mistaken if it believed that the statute was applicable to it, and this mistake was one of law for which restitution does not lie. The distinction we are now making is not a mere play upon words. The point is that the order did not force Cities to do anything.

It seems to us that plaintiff is thus obliged to fall back upon the theory of business duress, if there was no contract to refund. We do not have before us a finding of fact made after a hearing of testimony or upon a stipulation of facts; what we do have is a summary judgment, which may be entered only when there is no dispute of material fact and only one inference is justified. As applied here, to determine the propriety of the judgment below, we must decide whether the only reasonable conclusion is that Cities was compelled by duress to make the higher payments in order to meet its needs for gas.

In order to recover under the doctrine of business duress, Cities must, of course demonstrate the actual existence of duress, as well as the likelihood that serious harm would occur to its business if it did not pay the increase. 17 Am. Jur. § 7. In charging duress in this case, Cities relies heavily upon the Harrington case, supra. There, perhaps, an actual threat was made by the supplier to discontinue deliveries if the new rate was not paid; at least, the Court found that the buyer was justified in considering certain statements to be such a threat. See 139 F. Supp. 452. The present record contains nothing to show that Western made any threat or did anything else to force Cities to pay the higher price. In fact, § 7(b) of the Natural Gas Act prohibits a supplier from discontinuing service without permission of the Federal Power Commission. In short, the record does not establish what action Western would have taken had Cities refused to pay the higher price. We have already discussed the claim of duress arising from the Kansas regulation, and no other event or action constituting duress has been suggested.

In the second place, the record is insufficient to establish definitely a compelling necessity for Cities to continue purchasing from Western.

At the present stage, we cannot determine what additional evidence is required; we simply hold that the

present record does not necessarily lead exclusively to the inference of involuntary payment by Cities. The record fails to establish duress; it also fails to establish that Cities was in imminent danger of suffering immediate and substantial economic injury as a result of any duress.

Two other defenses raised by Western will be mentioned. It points out that Cities received higher rates from its customers and concludes that it has sustained no loss. The real losers are Cities' customers and at least as to the "jurisdictional" customers, Cities is required by an order of the Federal Power Commission to refund to them any amounts recovered here. To this extent, certainly, we think that this argument constitutes no defense. The statute of limitations would not bar a recovery if business duress is proven or it is to be ultimately determined that there was a contract to refund. Cf. Helmerich & Payne v. Colorado, etc., supra.

We do not foreclose Cities from reasserting its "contract" argument in the Court below. Because we cannot predict the ultimate conclusion of the trial Court as to either theory, we think it inadvisable at this time to determine the other questions raised, such as the amount of recovery, if any, and the matter of interest.

The prior opinions are withdrawn, and the decision of the Court below is reversed with directions to proceed in accordance herewith.

WOLCOTT, J. (dissenting):

I dissent from the conclusion reached by the majority that this case must be remanded for further proceedings. I would affirm the judgment below because, in my opinion, the record contains sufficient to demonstrate that Cities paid Western the 11c rate for gas under business compulsion, which therefore makes the payment of the excess involuntary on the part of Cities. The majority takes the view that the record is incomplete in this respect. I disagree.

When the Kansas order fixing the price at 11c was first promulgated it applied on its face to all who "take gas or cause gas to be taken" from the Hugoton Field. It seems plain, therefore, that until December 8, 1956, when the Supreme Court of Kansas in an attempt to save the order "construed" it to apply only to producers, 180 Kans. 454, 304 P. 2d 528, Cities was justified in thinking the order applicable to it and that a violation by it would have subjected it to criminal sanctions. Thus, it seems proper to me to conclude that from January 1, 1954 to December 8, 1956, at least, Cities was paying the additional 3c under the compulsion of fear of the criminal sanctions of the order, in part at least.

But of more importance in this respect is the fact that Western admittedly would have been subjected to the criminal sanctions of the order if it had sold gas to Cities at less than the 11c rate. Cities had to have the gas to supply its customers. It could obtain that gas from the Hugoton Field only by purchasing at 11c from Western to which it was bound by contract. Under the circumstances, Cities took the only reasonable course—it paid under protest and took steps to invalidate the order.

The majority says that the record is silent as to whether or not Western would have refused delivery to Cities if tendered the 8c contract price. If such was the fact, that is, if Western would have delivered for 8c and thus have deliberately flouted the Kansas order, admittedly applicable to it, that fact should have been made to appear affirmatively in the record by Western. It does not appear, and it does not seem reasonable to assume that Western would have had such little regard for the laws of Kansas within whose boundaries it was producing natural gas.

The majority says that Cities has made no showing that it could not have acquired the necessary gas from

other sources, or from its own reserves. Why should it be required to make such a showing? It had a contract with Western to supply its needs. To this contract both were bound.

I think this case is similar to *Natural Gas Pipeline Company* v. *Harrington*, 246 F. 2d 915, which should lead this Court to affirm the judgment below.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Superior Court of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

C.A. No. 674, 1958

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

a certain judgment or order was entered on the 25th day of June 1962, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on May 21, 1964, a certified copy of which is attached hereto:

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars No Cents—Dollars ($12.00) to be recovered by Western Natural Gas Company against Cities Service Gas Company, with right of execution; and the said cause is

hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS The Honorable Charles L. Terry, Jr., our Chief Justice at Dover, the first day of January, A.D. 1964.

Issued June 5, 1964.

E. TOWNSEND, JR.
Clerk of the Supreme Court

APPENDIX C

(Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County)

MEMORANDUM OF DECISION

(May 24, 1960)

On cross motions for summary judgment and defendant's motions to dismiss all of or a portion of the complaint.

John J. Morris, Jr. and Howard L. Williams (Morris, James, Hitchens & Williams) Attorneys for Plaintiff; Conrad C. Mount, Joe Rolston, Gordon J. Quilter and Robert R. McCracken, all of Oklahoma City, Oklahoma, of counsel.

Clair John Killoran (Killoran & VanBrunt) Attorney for Defendant; George D. Horning, Jr. and Patrick G. Sullivan (Hogan & Hartson) both of Washington, D.C.; and John C. Dawson (Liddell, Austin, Dawson & Huggins) Houston, Texas, of counsel.

CHRISTIE, J.:

Many of the facts in this case are substantially similar to those in *Cities Service Gas Company* v. *Columbian Fuel Corporation*, as recited in , Story , 155

A.2d 879, and in the related Supreme Court case at Storey , 158 A.2d 478 (application for certiorari now pending in the United States Supreme Court). A new recital of the facts will not be made here although new or different factual matter has been considered and will be touched upon herein.

One of the differences between this case and the cases cited above is that here defendant has filed a counterclaim based on plaintiff's failure to pay amounts alleged to be due under defendant's "filed rate theory" since December 23, 1957. The counterclaim is not separately discussed in this memorandum since the decision on the merits of the original claim effectively disposes thereof.

I

Defendant's motions are based largely on the following grounds:

(1) *Lack of jurisdiction in this Court.* This matter has been decided by the Delaware Supreme Court in *Columbian Fuel Corp., etc.* v. *Superior Court, etc. and Cities Service Gas Company,* Storey , 158 A.2d 478 (1960).

(2) *Failure of plaintiff to exhaust its administrative remedies.* Although this argument may not have been developed in the prior cases, nevertheless, I find it to have no merit in view of the rulings of this Court and the Supreme Court referred to above. No administrative remedy exists before the Federal Power Commission for the recovery of the money here sought. Since this Court does have jurisdiction and the Federal Power Commission does not have jurisdiction as to the remedy here sought, the rule that the parties must exhaust their administrative remedies finds no application here. Although the F.P.C. might, in its discretion, render a declaratory

order or some other decision which might have an important bearing on some of the issues in this case, such possibility does not amount to an administrative remedy which precludes plaintiff from seeking a complete remedy in this Court.

(3) *A part of plaintiff's claim is barred by the statute of limitations.* This argument is new in this case and will be dealt with herein.

The action was filed June 16, 1958. In this action, plaintiff seeks refunds for payments made by it for a period from January 1, 1954 to December 22, 1957. If the three year statute of limitations is applicable then that portion of the action which accrued prior to June 16, 1955 is barred.

The Delaware statute of limitations reads as follows:

"*Actions subject to three-year limitation*

"No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . ." (10 Delaware Code § 8106)

Another section provides that where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time

limited by the law of this State shall apply. 10 Del. Code § 8120. Plaintiff as a Delaware corporation is a resident of this State.

Statutes of limitations begin to run when proper parties are in existence capable of suing and being sued, and a cause of action exists capable of being sued on forthwith. *Keller* v. *Farmers Bank of State of Delaware*, 2 Terry 471, 24 A.2d 539 (Superior Ct., 1942). The parties do not disagree with this basic rule. A dispute arises from differing views as to the date on which the cause of action accrued or came into existence.

Defendant maintains that plaintiff's causes of action accrued as to each payment at the time the alleged overpayments was made. Thus, defendant insists that all claims based on payments made more than three years before June 16, 1958 are barred.

Plaintiff, on the other hand, maintains that the action did not accrue until January 20, 1958, when the United States Supreme Court declared the Kansas price order invalid. If plaintiff's contention is correct, then no part of the claim is barred by the statute.

Defendant points out that the minimum price order was not directly applicable to plaintiff and argues plaintiff could have simply refused to pay the price required under such order, since it applied to producers and not to purchasers. Thus, says defendant, there was no mandatory requirement for Cities to challenge the validity of the order before instituting an action for restitution and there was no restraint preventing Cities from instituting the action as soon as an alleged overpayment was made. It is argued that since nothing prevented plaintiff from suing as soon as the first payment was made, the statute of limitations began to run.

The case most nearly on point is *Natural Gas Pipeline Co. of America* v. *Harrington*, 139 F.Supp. 452, 461 (N.D.

Texas 1956) affirmed 246 F.2d 915, 921 (5th Cir. 1957). The facts in that case were substantially similar to those of the case at bar. The District Court there held that the cause of action did not arise until the final determination of the invalidity of a minimum price order similar to the order here involved. The Circuit Court affirmed the decision and adopted the same view as to when the cause of action arose.

It has often been held that a statute of limitations does not begin to run as to an action for restitution until the erroneous judgment or decree under which the money was paid is reversed. *Simmons* v. *Simmons*, 91 W.Va. 32, 112 S.E. 189 (1922); *Hudson's Estate* v. *Evans*, 11 S.W.2d 825 (Tex. 1928); *Kurn* v. *Pittsburgh Plate Glass Co.*, 48 F.Supp. 574 (D.C. Mo. 1942); *Restatement, Restitution* § 74. See also *Morford* v. *Bellanca Aircraft Corporation*, 6 Terry 129, 67 A.2d 542, 547 (Superior Ct. 1949) and *Abramson* v. *Delrose, Inc.*, 132 F.Supp. 440 (D.C. Del. 1955).

On the other hand, defendant cites a number of cases where the statute of limitations has been held to run from the time of an erroneous payment, and not from the time that the right to recovery was established. *Brink* v. *Kansas City*, 358 Mo. 845, 217 S.W.2d 507 (1949) (an invalid tax assessment); *Washington Sec. Co.* v. *State*, 9 Wash.2d 197, 114 P.2d 965 (1941) (an overpayment to the state for land); *Broadwell* v. *Board of Comm'rs.*, 88 Okla. 147, 211 Pac. 1040 (1922) (taxes paid on non-taxable land); *Ball* v. *United States*, 137 F.Supp. 740 (1st Cir.) cert. denied 352 U.S. 827 (1956) (suit for back pay after a District Court had determined that a serviceman had been improperly reduced in rank).

Although it may be true that the minimum price order did not apply directly to plaintiff, defendant attaches an unwarranted legal significance to this fact. A realistic appraisal of the legal situation as it existed prior to the

United States Supreme Court's decision rendered January 20, 1958 indicates that plaintiff was under a legal obligation, if it wished to purchase the gas, to pay the rates specified in the order.

Plaintiff would have been a party to a violation of state law if it had purchased the gas at rates lower than those specified in the price order. Plaintiff had an apparent duty to comply with state law and regulations promulgated thereunder until such law was changed or declared invalid. Under the circumstances, I find the authorities cited by plaintiff state the rules of law which should be applied in the case at bar. Because the minimum price order prevented the recovery plaintiff seeks, no right of action, which was capable of being sued on forthwith, existed in plaintiff before January 20, 1958.

The minimum price order in this case was a sweeping substantive regulation going far beyond the realm of mere administrative or procedural detail. In many respects it had the effect of a statute. A void regulation of general application which has the effect of a statute is roughly equivalent to an erroneous holding by a judicial body insofar as the period of limitations is concerned. The right to recovery funds paid on account of the erroneous judicial decision or the void statute depends upon a change in what then appears to be the applicable law. The need to change the apparently applicable law in cases such as these is in contrast with the need to correct an error which does not involve a change in the law. In cases such as the one before the Court, a right of action does not accrue until the law which forbids the recovery is declared void. On the other hand and in the case of erroneous administrative acts such as the collection of taxes not due, payment for land already owned or unauthorized demotion of military personnel, the right to recovery depends not upon a change in the apparently applicable law but rather upon making a proper showing under the

existing law. In those cases the period of limitations is often measured from the date of the error.

I find that the approach outlined above has many defects and tends to explain only part of the apparent conflict between the rules laid down in some of the authorities cited by the parties. However, under the peculiar circumstances of the case at bar, it is clear that the right of action for restitution did not accrue until January 20, 1958 and I so hold. To the extent that the authorities cited by defendant tend to indicate a different holding, I decline to follow them.

The above discussion of the period of limitations applies to the restitution phase of this case. Plaintiff also seeks to recover on the theory of an express contract, which plaintiff says came into existence when defendant accepted the increased payments subject to the reservations noted in plaintiff's letters dated August 25, 1953 and January 21, 1954. If an express contract exists, it is clear by the terms thereof that action thereon is not barred by the period of limitations.

II

Plaintiff's motion for summary judgment is based on voluminous record already compiled by pre-trial procedures in this case. The pertinent facts are not in dispute. Except for the obvious differences in amounts of gas delivered, the contract prices and the amounts claimed, the pertinent legally significant facts are substantially similar to the facts outlined in the *Columbian* case.

The issues raised by this motion were discussed in the dicta contained in the opinion in the *Columbian Fuel Corp.* case *supra*. The argument in this case was made before the decision in the *Columbian* case was rendered, and the briefs in both cases were before me before the first decision. The decision as to jurisdiction in the *Columbian* case was affirmed by the Delaware Supreme Court (158

A.2d 478). Since the review by the Supreme Court was on petition for writ of prohibition, there was no review of the merits of that decision. Furthermore, this Court has not yet addressed itself to plaintiff's motion for summary judgment in the *Columbian* case.

However, I continue to be of the opinion that my earlier opinion and the dicta contained therein correctly state the law as it applies to the *Columbian* case and the case at bar. Since this Court's decision was rendered, similar conclusions were reached in a similar case in the United States District Court for the District of Nebraska, after a careful consideration of most of the arguments here raised. *Kansas-Nebraska Natural Gas Co.* v. *Pan American Petroleum Corp.*, an unreported oral decision by Judge Robert Van Pelt).

A number of other issues were raised in the pleadings at argument which have not been specifically discussed in this memorandum or the prior decision. These issues are resolved so as to be consistent with the decision herein announced.

I find that the pleadings state a cause of action for restitution and the undisputed facts support the essential allegations of the pleadings. Therefore, plaintiff is entitled to the restitution it here seeks.

Defendant's motion will be denied. Plaintiff's motion for summary judgment in its favor is granted as to the original claim and as to the counterclaim.

Order and Final Judgment

And Now to Wit this 25th day of June, 1962, each of the parties hereto having moved for summary judgment, and the defendant having filed motions for reargument on June 3, 1960, and May 17, 1962, and the matters having been briefed and argued, and the Court having rendered its Memoranda of Decision dated May 24, 1960, June 20,

1960 and May 11, 1962, and its Letter Opinion of May 25, 1962, it is

ORDERED, that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED, that the defendant's motions for reargument are denied; and it is

FURTHER ORDERED, that plaintiff's motion for summary judgment is granted and judgment is hereby entered for plaintiff against defendant for the sum of $1,264,826.89 with simple interest thereon at the rate of six (6) percentum per annum from January 20, 1958, plus the costs of this action.

/s/ ANDREW D. CHRISTIE
Judge

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APPENDIX D

(Copy of Notice of Application and Date of Hearing in Western Natural Gas Co., Docket No. G-4882, as published in the Federal Register August 10, 1955).

[Docket No. G-4882]

WESTERN NATURAL GAS CO.

NOTICE OF APPLICATION AND DATE OF HEARING

August 4, 1955.

Take notice that Western Natural Gas Company, Applicant, a Delaware corporation whose address is Houston, Texas, filed on November 16, 1954, an application for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, authorizing Applicant to render service as hereinafter described, subject to the jurisdiction of the Commission, all as more fully represented in the application which is on file with the Commission and open for public inspection.

Applicant produces natural-gas from the Hugoton Field in Grant and Stanton Counties, Kansas and sells it in interstate commerce to Cities Service Gas Company for resale. The price of the gas is stated to be 11 cents per Mcf.

This matter is one that should be disposed of as promptly as possible under the applicable rules and regulations and to that end:

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act, and the Commission's Rules of Practice and Procedure, a hearing will be held on September 7, 1955, at 9:30 a.m., e.s.t., in Hearing Room of the Federal Power Commission, 441 G Street NW., Washington, D. C., concerning the matters involved in and the issues

presented by such application: *Provided, however,* That the Commission may, after a non-contested hearing, dispose of the proceedings pursuant to the provisions of section 1.30(c)(1) or (c)(2) of the Commission's Rules of Practice and Procedure.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure (18 CFR 1.8 or 1.10) on or before August 25, 1955. Failure of any party to appear at and participate in the hearing shall be construed as waiver of and concurrence in omission herein of the intermediate decision procedure in cases where a request therefore is made.

J. H. GUTRIE
Acting Secretary

[SEAL]

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JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 408

WESTERN NATURAL GAS COMPANY,
Petitioner,
VERSUS
CITIES SERVICE GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

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September, 1964

UTTE BACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0780

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In the
Supreme Court of the United States
OCTOBER TERM, 1964

No. 408

WESTERN NATURAL GAS COMPANY,
Petitioner,

VERSUS

CITIES SERVICE GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 201 A.2d 164 and is printed as Appendix B to the Petition for Writ of Certiorari, pp. 10a-22a. The opinion and judgment of the Superior Court of the State of Delaware in and for New Castle County are printed as Appendix C to the Petition for Certiorari, pp. 22a-30a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is the judgment of the Supreme Court of Delaware remanding this case to the trial court for trial upon its merits a final judgment or decree within the terms of 28 U.S.C. § 1257?

2. Whether a state court having jurisdiction over plaintiff's suit based upon claims of right arising under state law also has jurisdiction to pass upon defenses to that suit raising federal questions arising under the Natural Gas Act?

3. Whether the void Kansas Minimum Price Order increased the rate for natural gas sold by defendant producer to the plaintiff pipeline company for resale in interstate commerce simply because a copy of the void order was deposited with the Federal Power Commission as a part of the defendant producer's rate filing under the Natural Gas Act?

STATUTES INVOLVED

The statute involved in the first question is 28 U.S.C. § 1257, set out in the Appendix hereto. The statutes involved in the second and third questions are cited under Statutes Involved, page 2, Petition for Writ of Certiorari, and are printed in Appendix A thereto.

STATEMENT OF THE CASE

This suit is the last of four identical actions commenced by Cities Service Gas Company (Cities) in the Superior Court of New Castle County, Delaware, to re-

cover overpayments made by Cities to four producers of natural gas in the Kansas-Hugoton Field under the mandate of the Kansas Minimum Price Order, which was held invalid by this Court in *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U.S. 391 (1958).[1]

Three of the four producers sought and obtained a writ of certiorari in this Court to review the jurisdiction of the Delaware court, 363 U.S. 818, and this Court affirmed that jurisdiction. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961). The facts stated in that opinion are substantially identical with the facts in the case at bar.

Cities is a natural gas pipeline company. Petitioner, Western Natural Gas Company (Western), is a producer of natural gas. In September, 1949, Cities contracted with Western to purchase natural gas produced in the Hugoton Field in Kansas, at the contract price of 8¢ per Mcf (A4, A10).

On December 2, 1953, the Kansas Corporation Commission issued an Order, to take effect on January 1, 1954, fixing a minimum price of 11¢ per Mcf to be paid for all gas taken from the Field. The effect of this Order was to require Cities to pay Western the 11¢ price rather than the lower price fixed in the contract (A4-5, A10).

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[1] The litigation with producers other than Petitioner has now been terminated, and the moneys recovered by Cities have been passed on to Cities' customers who paid an increased price on account of the void Kansas Order.

On January 21, 1954, prior to making its first payment under the Order, Cities advised Western by letter that it was prosecuting a suit for judicial review of the Order but that it would comply with the Order during the pendency of the suit. The letter advised that the payments to be tendered under the Order were to be made and to be accepted as involuntary payments. The letter concluded that if the Order was determined to be invalid, then Cities would expect Western to refund the overpayments made under the Order (A5-6, A11).

Thereafter until January 20, 1958, each monthly payment by Cities to Western was made by a voucher check which bore the notation that the payments were tendered "subject to provisions" of the January 21, 1954 letter. Western received and cashed each voucher check without objection, and retained the proceeds thereof (A6-7, A11).

On January 20, 1958, this Court held that the Kansas Minimum Price Order was invalid. *Cities Service Gas Co.* v. *State Corporation Comm'n, supra.*

Following such decision, Cities commenced this action in the Superior Court of Delaware. In all material respects, the Complaint filed in this case was identical with the complaints which are described in this Court's opinion in the *Pan American* case, 366 U.S. 656, 661 (A4-9).

Cities alleged the Gas Purchase Contract specifying the 8¢ price; the entry of the Kansas Corporation Commission's Minimum Price Order; Cities' letter of January 21, 1954; Cities' monthly voucher checks with the "subject to provisions" noted thereon; and this Court's determination

that the Kansas Order was invalid (A4-7). Based upon these allegations Cities sued for the overcharges paid to Western, on alternative theories that there was a contract to refund the overpayments and that Cities was entitled to restitution of the overpayments by which Western had been unjustly enriched under the compulsion of the invalid Kansas Order (A7-9).

Western's principal defense to the suit was based upon its status as an independent producer of natural gas under the Natural Gas Act and upon the regulation of its rates by the Federal Power Commission (A10-16).

Western contended that the trial court was without jurisdiction over the suit. Its position was that the determination as to what its filed rate was and as to whether or not it had been overpaid for gas delivered to Cities were matters within the exclusive jurisdiction of the Federal Power Commission under Section 20 of the Natural Gas Act, 15 U.S.C. 717s (A12).[2] Western also defended the suit upon the ground that by reason of the filing of a copy of the void Order along with the Contract as its rate schedule under the Natural Gas Act its rate was 11¢; that there could be no deviation from that rate and that therefore Cities was not entitled to any recovery (A10-14). The facts in this regard are as follows:

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[2] This question was presented to this Court in *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961), in which it was held that state courts have jurisdiction over suits such as these based on common-law rights even though the defense is based upon the Natural Gas Act. Western was not a party to the *Pan American* case but its case was delayed pending the determination of the jurisdictional question.

On June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), this Court held that the Federal Power Commission had jurisdiction over sales of natural gas such as those made by Western to Cities. Under appropriate orders of the Federal Power Commission, Western filed as its rate schedule the gas purchase contract between the parties and a copy of the Kansas Minimum Price Order (A100-102). Western's rate schedule was accepted for filing by the Commission on March 5, 1955, by a letter from the Commission to Western. The Commission's letter provided specifically that acceptance of the filing should not "be construed as constituting approval of any rate, charge, classification, etc." (A90-91). The Commission also issued a Certificate of Public Convenience and Necessity authorizing Western's sale of gas to Cities. The Certificate made no reference to the price at which the sale was to be made (A31-34).

Subsequently, in an entirely separate proceeding the Federal Power Commission commenced an investigation of Western's rates under Section 5(a) of the Natural Gas Act. This investigation was dismissed by an Order of the Commission which concluded:

> "* * * Furthermore, this order . . . shall not be construed as a determination as to what the effective legal rates are or have been for jurisdictional sales by Western." (23 F.P.C. 235, 237.)

Finally, Western contends that notwithstanding this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court, supra,* the Delaware courts should have refrained from trying this case. The contention is predi-

cated upon the fact that Western filed a complaint in Docket No. G-14958 with the Commission seeking a determination of its effective filed rate (A124-139). The Commission has refused to hear the matter. In its Order in said Docket No. G-14958, the Commission referred specifically to the case at bar then pending in the trial court, and concluded:

> " 'Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission at this time to undertake to determine the rates for those sales . . .' " (Opinion, p. 14a, Appendix B, Petition for Writ of Certiorari.)

In dismissing its proceeding considering rate schedules based on void minimum price orders generally, the Commission similarly stated:

> "* * * We recognize . . . that a buyer of natural gas who has paid Seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate Court in the event that his contract provides for a refund if the State minimum price laws are held invalid." (27 F.P.C. 327.)

Based upon the above facts with respect to its Natural Gas Act defenses, Western filed its Motion for Summary Judgment. Cities filed its Motion for Summary Judgment based upon its common-law theories of contract and restitution. The trial court overruled Western's Motion and sustained Cities' Motion, entering judgment for Cities in the amount sued for with interest thereon at 6 per cent per annum (A344).

Upon Western's appeal, the Supreme Court of Delaware rejected Western's Natural Gas Act defenses. It was held that this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court, supra,* affirmed the jurisdiction of the trial court over the suit, and that the uniform decisions of the United States Courts of Appeals[3] supported and required the determination that Western's filed rate under the Natural Gas Act was the 8¢ contract rate, unaffected by the void Kansas Minimum Price Order (Appendix B, Petition for Writ of Certiorari).

Notwithstanding its determination that Western had received payments in excess of its filed rate, the Delaware Supreme Court held that under some circumstances Western might be entitled to retain such overpayments under the doctrine of voluntary payments under state law. Accordingly, the Court remanded the case for trial upon its merits (Appendix B, Petition for Writ of Certiorari).

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[3] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.,* 297 F.2d 561 (8th Cir. 1962), *cert. denied* 370 U.S. 937 (1962); *Natural Gas Pipeline Company of America* v. *Federal Power Commission,* 253 F.2d 3 (3d Cir. 1958), *cert. denied sub nom Dorchester Corp.* v. *Natural Gas Pipeline Co.,* 357 U.S. 927 (1958); *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F.2d 860 (10th Cir. 1958), *cert. denied sub nom Magnolia Petroleum Co.* v. *Cities Service Gas Co.,* 358 U.S. 837 (1958).

ARGUMENT

I.

The judgment of the Supreme Court of Delaware remanding this case to the trial court for trial upon its merits is not a final judgment or decree within the terms of 28 U.S.C. § 1257.

This case is outside the appellate jurisdiction of this Court. 28 U.S.C. § 1257 limits this Court's authority to the review of *final* judgments of state courts. "It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548, 551 (1945). The judgment of the Supreme Court of Delaware is not such a final judgment.

The judgment for which Petitioner seeks review reversed the trial court's order on the parties' cross-motions for summary judgment. The Delaware Supreme Court's judgment simply vacated the trial court's judgment in Cities' favor and remanded the case for trial upon its merits. The breadth of the unresolved issues to be tried upon remand are described in the Court's opinion as including the question as to the voluntary vs. involuntary nature of Cities' payments; the issue of the statute of limitations; whether or not there was a contract to refund; the amount of Cities' recovery, if any; and the question of interest (Appendix B, Petition for Writ of Certiorari).

The decisions of this Court holding that such a judgment is not a final judgment within 28 U.S.C. § 1257 are legion. Among such decisions are: *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543 (1947); *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62 (1948); *Pope* v. *At-*

lantic Coast Line R. Co., 345 U.S. 379 (1953); *Laclede Gas Light Co.* v. *Missouri Public Service Commission*, 304 U.S. 398 (1938); *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493 (1956).

Petitioner suggests that the judgment in this case is final within the principles announced in *Local No. 438* v. *Curry*, 371 U.S. 542 (1963), and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). These cases are not in point.

In *Local No. 438* this Court reviewed the authority of the trial court to entertain the suit against a challenge of its jurisdiction. In *Mercantile National Bank* this Court reviewed the authority of the trial court to entertain the suit against a challenge of its venue. This is not the question presented here.

The authority of the trial court to entertain this action has been finally decided in *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961). In that case this Court held that the Superior Court of Delaware had jurisdiction over suits based upon common-law claims founded in state law. The complaints considered in *Pan American* are identical with the complaints in the case at bar. Moreover, this Court made it crystal clear that the Delaware Courts had jurisdiction to decide Federal questions under the Natural Gas Act which were raised in defense of such a suit. 366 U.S. 664-666.

Thus, the question sought to be presented here does not involve the jurisdiction of the trial court. Rather, the question involves the correctness of the Delaware court's

decision on a Federal question in a case which was clearly within its jurisdiction (pp. 12, 13, Petition for Writ of Certiorari).

This aspect of the case at bar distinguishes it from *Local No. 438* v. *Curry* and *Mercantile National Bank* v. *Langdeau* just as those cases were distinguished from *Gibbons* v. *Ogden, infra.* In explaining this distinction this Court said:

> "The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare Gibbons v. Ogden (US) 6 Wheat 448, 5 L ed 302) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare Teamsters, C. W. & H. v Lucas Flour Co. 369 US 95, 7 L ed 2d 593, 82 S Ct 571. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." (371 U.S. 548.)

This case is not governed by *Local No. 438* v. *Curry* and *Mercantile National Bank* v. *Langdeau*. It is controlled by the cases cited at pages 10-11 of this brief.

The Petition for Writ of Certiorari should be denied for lack of a final judgment or decree.

II.

A state court having jurisdiction over plaintiff's suit based upon claims of right arising under state law also has jurisdiction to pass upon defenses to that suit raising federal questions arising under the Natural Gas Act.

The first question presented for review by Petitioner has been fully answered by this Court in *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961).

Petitioner challenges the jurisdiction of the state courts of Delaware to entertain a common-law suit founded in state law because its defense is founded upon federal law. The arguments made by Petitioner in support of its position are precisely the same as those made by petitioners in *Pan American*. The authorities cited by Petitioner here are precisely the same as those cited by petitioners there.

This Court disposed of the question as follows:

> "Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. In Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477, the question before the Court was whether not merely the state courts but any court had jurisdiction to construe a tariff prior to consideration of the disputed question of construction by the Interstate Commerce Commission. It was argued in that case, as it is argued here, that to permit entry into the courts, without initial resort to the Commis-

sion, would destroy essential uniformity. The answer there given by Mr. Justice Brandeis, speaking for the Court, applies here:

> " 'This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.' 259 U.S at 290, 291." (366 U.S. 665-666.)

Western suggests no reason why this Court should depart from this long and well-settled principle.

III.

The void Kansas Minimum Price Order did not increase the rate for natural gas sold by the defendant producer to the plaintiff pipeline company for resale in interstate commerce simply because a copy of the void order was deposited with the Federal Power Commission as a part of the defendant producer's rate filing under the Natural Gas Act.

More than nine years have passed since this Court first held that the Order of a state purporting to fix a minimum price to be paid for natural gas sold in inter-

state commerce for resale was void. *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 444 (1955); *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U.S. 391 (1958).

During those nine years many actions of pipeline companies to recover overpayments made under such void orders have been before the courts, both state and federal. All of this litigation has involved an assertion by the producer that the Order, although invalid, was effective to increase its rate because a copy of the Order was filed with the Federal Power Commission as a part of the producer's rate schedule. Without exception, the courts, both state and federal, have in each instance rejected the argument, and in each instance that an attempt was made to seek review by this Court, this Court refused to grant the request.

Typical of these uniform decisions is *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied* 370 U.S. 937 (1962). The Court of Appeals for the Eighth Circuit held:

> "When the Supreme Court of the United States in Cities Service Gas Co. v. State Corporation Commission of Kansas, 1958, 355 U.S. 391, 78 S.Ct. 381, 2 L.Ed.2d 355, held the Kansas 11¢ order unlawful and the Supreme Court of Kansas, in Cities Service Gas Co. v. State Corporation Commission of Kansas, 1959, 184 Kan. 540, 337 P.2d 640, certiorari denied 361 U.S. 836, 80 S.Ct. 89, 4 L.Ed.2d 77, held in accordance with such decision that the Kansas 11¢ order was void *ab initio*, the effect was that the order became a complete nullity. Being a nullity, it could not modify the contract rates between the parties. The effect could only have been to leave the parties where they were

> prior to the unlawful order—in other words, bound by the contract rates to which they had agreed in 1949, 1950 and 1952."

The language is almost verbatim the language of the Court of Appeals for the Third Circuit in *Natural Gas Pipeline Co. of America* v. *F.P.C.*, 253 F.2d 3, 7 (1958), *cert. denied sub nom. Dorchester Corp.* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958), and of the Court of Appeals for the Tenth Circuit in *Cities Service Gas Co.* v. *F.P.C.*, 255 F.2d 860, 865 (1958), *cert. denied sub nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958). Cf. *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F.2d 915 (5th Cir. 1957), *cert. denied* 356 U.S. 957 (1958).

The Delaware decision is also in accord with the decisions of the United States District Court for the Northern District of Oklahoma in *Cities Service Gas Co.* v. *United Producing Co.*, 212 F.Supp. 116 (1960), and the decision of the United States District Court for Kansas in *Northern Natural Gas Co.* v. *Landon*, 212 F.Supp. 856 (1961). The Delaware decision follows the Court's earlier expressions to the same effect in *Columbian Fuel Corporation* v. *Superior Court*, 158 A.2d 478 (1960).

Western argues that its case is somehow different from all of the other cases in that the Federal Power Commission determined its rates in a proceeding under Section 5(a) of the Natural Gas Act. The language of the Commission's Order itself disposes of that argument. The Commission said that its Order was *not* a "determination as to what the effective legal rates are or have been for jurisdictional sales by Western" (A182).

It is respectfully submitted that there is no occasion for this Court to review on certiorari the decision of the Delaware Supreme Court which is in accord with and supported by every adjudication of every court which has passed upon the question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.